Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SALLY MAE SANDERS TEAL,

Petitioner,

v.

CALVIN WOODARD BUCKNER, and wife, BOBBIE JO BUCKNER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF TENNESSEE

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QUESTIONS PRESENTED

1. Whether a final decree of adoption is void and should be set aside when the natural mother was deprived of the minimal requirements of due process of law.

2. Whether the adoption statutes of Tennessee are unconstitutional, when they permit a valid adoption and termination of parental rights without written consent, service of process, or notice as to the essentials of a judicial hearing.

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Sally Mae Sanders Teal, and the respondents Calvin Woodard Buckner, and wife, Bobbie Jo Buckner.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF TENNESSEE

The petitioner, Sally Mae Sanders Teal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Tennessee, entered in the above-entitled proceeding on March 9, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee at Nashville, is an unreported opinion, and is reprinted in the appendix hereto, p. 1a, *infra.*

The memorandum decision of the Court of Appeals of Tennessee, Middle Section of Nashville, has not been reported and it is reprinted in the appendix hereto, p. 3a, *infra.*

JURISDICTION

The judgment of the Court of Appeals of Tennessee, Middle Section at Nashville, was entered on October 1, 1986, affirming the judgment of the trial court dated May 7, 1985, denying the petitioner's motion to set aside a final decree of adoption.

The Court of Appeals of Tennessee, Middle Section at Nashville, denied a timely filed petition for rehearing on December 10, 1986. Thereafter, on March 9, 1987, the Supreme Court of Tennessee at Nashville, denied the petitioner's timely application for permission to appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

STATUTES INVOLVED

United States Constitution, Amendment 14

Section 1. *Citizens of the United States.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tennessee Code Annotated section 36-1-127(b)

After the final order of adoption is signed, no party to an adoption proceeding, nor anyone claiming under such a party, may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall

be fully bound thereby, save for such appeal as may be allowed by law . . .

STATEMENT OF THE CASE

The petitioner, Sally Mae Sanders Teal, is the natural mother of Richard Lee Mason Sanders. On June 1, 1982, a petition for adoption was filed by the respondent, Calvin Woodard Buckner and wife, Bobbie Jo Buckner, containing a signature purported to be that of Sally Mae Sanders. It was alleged in the petition that the natural mother, Sally Mae Sanders, was joining in the petition and giving her consent to the adoption.

On August 17, 1982, a final decree of adoption was entered by the Court establishing the relationship of parent and child between Richard Lee Mason and the respondents.

On October 16, 1984, your petitioner, Sally Mae Sanders Teal, filed a motion pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, to set aside the final decree of adoption alleging: 1.) That the judgment was void because she was never made a party to the lawsuit, nor did she have any notice of the lawsuit; and 2.) Her purported signature on the petition and the attached oath were forgeries; that at the time of her forged signature she was in the state of Texas.

Your petitioner further stated that she learned in July, 1984, that her son had been adopted by Calvin Woodard Buckner and Bobbie Jo Buckner.

On November 8, 1984, Mr. and Mrs. Buckner filed an answer admitting that Mrs. Buckner signed the name of Ms. Sanders to the petition. However, the

respondent stated that the signature of Sally Mae Sanders was authorized, and was not a forgery.

After a trial on the issues, the Chancellor entered a final decree on May 7, 1985, holding; (1) That the motion under Rule 60.02 of the Tennessee Rules of Civil Procedure was not timely filed; (2) The natural mother authorized her mother, Bobbie Jo Buckner to sign her name to the adoption petition; (3) Mrs. Buckner showed the final decree to Ms. Sanders in early 1983.

On appeal to the Court of Appeals for Tennessee, Middle Section at Nashville, your petitioner raised the following issues: 1. Whether the trial court erred in holding that a petition to set aside an adoption decree must be filed within one year of the final decree. 2. Whether the final decree of adoption is void and should be set aside because: (a) the natural mother did not give written consent, her signature having been forged on the adoption petition, (b) the natural mother was not a party to the adoption proceeding and was not afforded her constitutional right of due process.

The Court of Appeals specifically held,

> "The record in this case is clear that T.C.A. Section 36-1-114 was not complied with. However, we are of the opinion that under the circumstances of this case the failure of the trial court in the original adoption proceeding to strictly follow the statute does not render the subsequent decree of adoption null and void."

The Court of Appeals further held,

> "We also find no merit to Mrs. Teal's contention that she was 'not afforded her constitutional right of due process.'"

The petitioner filed a petition to rehear on October 10, 1986. The issue presented for rehearing was "whether the adoption statutes are unconstitutional if they can be construed so as to permit a valid termination of parental rights without written consent, service of process, or notice as to the essentials of a judicial hearing." The Court of Appeals denied the petition to rehear.

Your petitioner then filed an application for permission to appeal to the Supreme Court of Tennessee at Nashville. In the application for permission to appeal, the questions presented for review were "1. Whether the decision of the Court of Appeals conflicts with prior decisions of the Court of Appeals, the Supreme Court of Tennessee, and the United States Supreme Court; the Court of Appeals having affirmed a judgment after specifically finding that; (a) the trial Court's decision was based on an erroneous application of the law, (b) the applicable statutes were not complied with, (c) there was no service of process, (d) and there was no written consent. 2. Whether the adoption statutes of Tennessee are unconstitutionally vague, if they can be construed to permit a valid termination of parental rights without written consent, service of process, or notice as to the essentials of the initial hearing."

On March 9, 1987, the Supreme Court denied permission to appeal, concurring in results (of the Court of Appeals opinion) only.

REASONS FOR GRANTING THE WRIT

Your petitioner, Sally Mae Sanders Teal, would respectfully request this Honorable Court to review the judgments of the Tennessee courts, specifically upholding an adoption when no service of process was had upon her, the adoption statutes were not complied with, she did not give written consent and was not given notice of the essentials of the adoption proceedings.

The decision rendered by the Tennessee Courts conflicts with prior decisions of the Supreme Court of the United States.

In the *Armstrong v. Manzo,* 85 S. Ct., 1187, 1190, (1965), this Honorable Court held that the failure of the mother and her successor husband to notify the divorced father of the pendency of the adoption proceedings deprived the father of due process of law so as to render the adoption decree constitutionally invalid.

The Supreme Court of the United States stated in *Armstrong v. Manzo,* supra, at page 1190;

> "It is clear that failure to give the petitioner notice of pending adoption proceedings violated the most rudimentary demands of due process of law. 'Many controversies have raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Tr. Co.,* 339 U.S. 306, at 313, 70

> S.Ct. 652, at 656, 94 L.Ed. 865. An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (citations omitted).

In the case at bar, the Court of Appeals in its memorandum opinion specifically stated, "Mrs. Teal did not sign the original adoption petition, nor was she served with process." They further stated, "Tennessee Code Annotated Section 36-1-114 was in effect at the time of the adoption proceeding and provides that a natural parent giving up his/her child for adoption must execute a formal surrender 'before a judge in chamber in chancery or circuit court.' The record in this case is clear that Tenn. Code Ann. section 36-1-114 was not complied with."

Tennessee Code Annotated, Section 36-1-114, prescribes the form of the proper consent/surrender required to be executed, which provides in part;

> "I . . . . hereby execute said surrender of *all parental rights and responsibilities and consent for said child to be legally adopted by adopting parents)* . . . I understand that by signing this surrender *all my rights and responsibilities with respect to this child are terminated.* I agree not to attempt to disrupt this child's future relationship by visiting, attempting to communicate with him, or attempting his removal either physically or through legal proceedings."

In the case at bar, the natural mother did not execute the required consent form nor any other document terminating her parental rights.

The petition filed by the adopting parents did not contain any request that parental rights be terminated, nor did the final decree of adoption state that parental rights were terminated. Your petitioner would urge that notice of the termination of parental rights is essential to a valid adoption.

The holding in the case at bar conflicts with prior decisions of the Tennessee Supreme Court, specifically, *Terrazas v. Riggs,* 612 S.W.2d 461 (Tenn. App. 1980), cert. denied, 450 U.S. 921, 101, S.Ct. 1370, 67 L.Ed.2d 349 (1981). In the *Terrazas v. Riggs* case the Tennessee Supreme Court held that there can be no valid adoption without a valid termination of parental rights.

The decision in this cause further conflicts with other Tennessee decisions. *In re: Adoption of Edmond,* 348 S.W.2d 345, (Tenn. App. 1961) provides that the adoption of a child is governed by statute, and to affect a legal adoption, the statute must be strictly complied with.

It has further been held that the adoption statutes, in order to be constitutional must be construed so as to authorize the adoption of a child only in cases (1) where the natural parents consent, (2) where the proof shows that the child has been abandoned by its natural parents, or (3) that its manifestly to the interest of the child that it be taken from their custody by some judicial proceeding of which they have notice. *In re: Knott,* 197 S.W. 1097 (Tenn. 1917).

The U. S. Supreme Court has recognized on numerous occasions that the relationship between parent and child is constitutionally protected. *Quilloin v. Walcott,* 434 U.S. 246, 54 L. Ed.2d 511, 98 S.Ct. 549.

The Tennessee courts have found no merit to Mrs. Teal's contention that she was not afforded her constitutional right of due process. The Tennessee legislature has adopted a statute, T.C.A. 36-1-127(b) which states:

> "After the final order of adoption is signed, no party to an adoption proceeding, nor anyone claiming under such a party, may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law."

The Court of Appeals has relied upon this statute to refuse to set aside the adoption decree. After finding that the petitioner did not sign the original adoption petition and was not served with process, the Court of Appeals in a split opinion found that under the facts as found by the trial court, she was a party to the adoption.

Your petitioner asserts that this particular provision is unconstitutionally vague in that the State Courts in their application of this law hold that regardless of whether the parents have had notice or opportunity to be heard, or have been made necessary parties to the judicial proceedings, or regardless of whether they have given consent, and regardless of whether they have any notice that their parental rights are being terminated, the adoption will be upheld.

Your petitioner asserts that it is extremely important for this Court to review this judgment in that the State Courts have totally ignored the constitutional rights of the natural parent. The adequacy of the procedural safeguards should be closely scrutinized if the statutes of Tennessee can be construed to permit valid judgments without service of process and notice of the essentials of the lawsuit.

CONCLUSION

For the reasons set out above, your petitioner asserts that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

CALVIN WOODARD BUCKNER, and wife, BOBBIE JO BUCKNER,

Appellees,

vs.

UNKNOWN FATHER OF RICHARD LEE MASON SANDERS,

Defendant.

(SALLY SANDERS TEAL, *Appellant*)

FILED
MAR 9 1987

COFFEE EQUITY

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF SALLY SANDERS TEAL

Upon consideration of the application for permission to appeal and brief in support thereof of Sally Sanders Teal, the opinions of the Court of Appeals and the record in the cause,

Permission to appeal is denied concurring in results only at the cost of appellant.

PER CURIAM

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

Appeal No. 86-136-II
COFFEE EQUITY

CALVIN WOODARD BUCKNER and wife, BOBBIE JO BUCKNER
Petitioners-Respondents/Appellees,
vs.

THE UNKNOWN FATHER OF RICHARD LEE SANDERS
Respondent.
(SALLY MAE SANDERS TEAL, *Appellant*)

FILED
DEC 10 1986

ORDER ON PETITION TO REHEAR

Sally Sanders Teal has filed a petition to rehear which has been considered by the Court and found to be without merit.

The petition is denied and costs are adjudged against Sally Sanders Teal.

/s/ Samuel L. Lewis
SAMUEL L. LEWIS, Judge

CONCUR:

/s/ Henry F. Todd
HENRY F. TODD, Presiding Judge, M.S.

/s/ William C. Koch, Jr.
WILLIAM C. KOCH, JR., Judge

APPEAL NO. 86-136-II

COFFEE EQUITY

CALVIN WOODARD BUCKNER and wife, BOBBIE JO BUCKNER
Petitioners-Respondents/Appellees,
vs.

THE UNKNOWN FATHER OF RICHARD LEE MASON SANDERS,
Respondent.
(SALLY MAE SANDERS TEAL, *Appellant*)

FILED
OCT 1 1986

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE CHANCERY COURT FOR COFFEE COUNTY, TENNESSEE THE HONORABLE L. F. STEWARD, JUDGE

AFFIRMED AND REMANDED

SAMUEL L. LEWIS
JUDGE

APPEAL NO. 86-136-II

COFFEE EQUITY

CALVIN WOODARD BUCKNER and wife, BOBBIE JO BUCKNER
Petitioners-Respondents/Appellees,

vs.

THE UNKNOWN FATHER OF RICHARD LEE MASON SANDERS
Respondents.

(SALLY MAE SANDERS TEAL, *Appellant*)

OPINION

This is an appeal by Sally Mae Sanders Teal (Mrs. Teal) form the denial of her Tennessee Rule of Civil Procedure 60.02 motion of which she sought to set aside a final decree of adoption.

This appeal arose out of the following facts and circumstances.

On June 1, 1982, respondents Calvin Woodard Buckner and Bobbie Jo Buckner[1] filed theier petition in the Chancery Court for Coffee County, Tennessee, against the unknown father of Richard Lee Mason Sanders and sought to adopt Richard Lee Mason Sanders, who was born on April 17, 1978.

The petition alleges that "[t]he natural mother of the child is Sally Mae Sanders, who is joining in this petition and is giving her consent to this adoption, as provided by law." The petition contains the signatures of the Buckners and the purported signature of Sally Mae Sanders.

---

[1] We will hereafter refer to the respondents as the Buckners or individually by name.

Sally Mae Sanders Teal is the daughter of respondent Bobbie Jo Buckner and the step-daughter of Calvin Woodward Buckner.

On August 17, 1982, a "FINAL DECREE OF ADOPTION" was entered which provided in part "the said Richard Lee Mason Sanders is hereby ORDERED adopted by petitioners Calvin Woodard Buckner and wife, Bobbie Jo Buckner.

On October 16, 1984, Mrs. Teal filed her Tennessee Rule of Civil Procedure 60.02 motion and sought to have the final decree of adoption set aside because (1) the judgment is void because Mrs. Teal, the natural mother, "was never made a party of [*sic*] this lawsuit nor did she have notice of the lawsuit," and (2) her purported signature on the petition "is a forgery."

The Buckners filed a response which states that Mrs. Teal "knew that Richard Lee Mason Sanders was being adopted" and that she "consented to and aided the process and wanted to and did join in the petition." They further alleged that Mrs. Teal's "signature was authorized" and therefore was not a forgery and that the motion was not timely made, not having been made within one year after judgment as required by Tennessee Rule of Civil Procedure 60.02.

On May 7, 1985, following an evidentiary hearing on November 19, 1984, the trial court entered a decree dismissing Mrs. Teal's motion. The court made the following findings of fact:

> 1. The motion was not timely filed under Rule 60.02, Tennessee Rules of Civil Procedure, in that it was not filed within one (1) year after the judgment was entered.
>
> 2. The letter from petitioner, Sally Mae Sanders, to respondent, Bobbie Jo Buckner, dated May 11, 1982 and entered as Exhibit 1 in this cause

was not persuasive to the Court and the Court finds that the parties had talked about the adoption several times and that petitioner knew that her son, Richard Lee Mason Sanders, was being adopted by the respondents, Calvin Woodard Buckner and wife, Bobbie Jo Buckner, and that she consented to the adoption and aided in the adoption process and authorized her mother, Bobbie Jo Buckner, to sign her name to the adoption petition and therefore, Sally Mae Sanders was properly made a party to the adoption petition and process.

3. Petitioner had had a problem caring for the child and that problem had reached a point where adoption by the respondents was a reasonable alternative; that although petitioner was in somewhat of a condition of desperation she consented to the adoption.

4. That petitioner was shown the Adoption Decree by Calvin Buckner and Bobbie Jo Buckner in early 1983 and she read it fully and voiced no objection to the wording of the final decree except she was upset because "Mason" was left out of the child's name change.

The Court is of the opinion and so finds and concludes that the petitioner, Sally Mae Sanders, knowingly gave her consent to the adoption and the adoption was and is valid and therefore the Motion to correct the adoption Order and the Petition to Set Aside the Adoption Order are denied.

No transcript of the evidence has been filed in this case. In the absence of a transcript of the evidence, it is a well settled rule in this state that it is "conclusively presumed" on appeal that the findings of fact made by the trial court are supported by the evidence in that court and must be

accepted as true by the appellate court. *J.C. Bradford & Co v. Martin Construction Co.*, 576 S.W.2d 586, 587 (Tenn. 1979).

We must, in the absence of a transcript of the evidence, "conclusively presume" that Mrs. Teal had notice of and aided in the adoption, that she gave her consent to the adoption, and authorized her mother, respondent Bobbie Jo Buckner, to sign here name to the petition.

At oral argument, Mrs. Teal, through her counsel, admitted that those findings of the trial court were conclusive and did not attempt to challenge them.

However, she argues by her second issue that, notwithstanding these findings, the "Final Decree of Adoption" is invalid and should be set aside because: A.) the natural mother did not give here written consent, her signature having been forged upon the adoption petition, [and] B.) the natural mother was not a party to the adoption proceedings and was not afforded here constitutional right of due process.

We first deal with Mrs. Teal's contention that her signature was forged. "Forgery is the fraudulent making or alteration of any writing to the prejudice of another's rights." *Tenn. Code Ann.* § 39-3-802. An authorized signing of another's name is not forgery. The Chancellor found that Mrs. Teal "authorized her mother, ... to sign her name to the petition." Mrs. Teal's contention that her name was forged to the adoption petition is without foundation.

Tennessee Code Annotated § 36-1-114 was in effect at the time of the adoption proceeding and provides that a natural parent giving up his/her child for adoption must execute a formal surrender "before a jude in chambers of chancery or circuit court." The record in this case is clear that Tenn. Code Ann. § 36-1-114 was not complied with. However, we are of the opinion that under the circum-

stances of this case the failure of the trial court in the original adoption proceeding to strictly follow the statute does not render the subsequent decree of adoption null and void.

This Court, in *Brown v. Raines*, 611 S.W.2d 594 (Tenn. App. 1980), a case in which the natural mother attacked the final decree of adoption because there was no formal surrender, held that the requirement of strict compliance.

> does not apply however when a final decree of adoption, no longer subject to appeal, is attacked either collaterally or by an independent action in equity for relief from a judgment. In this situation the provisions of [Tenn. Code Ann. § 36-1-127(b)] apply:
>
> > "After the final order of adoption is signed, no party to an adoption proceeding, nor anyone claiming under such a party, may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law."
>
> The policy behind this provision is clearly expressed in [Tenn. Code Ann. § 36-1-101]. First, it is intended to protect children "from interference, long after they have become properly adjusted to their adoptive homes, by natural parents who may have some legal claim because of a defect in the adoption procedure." Second, it protects the adopting parents by preventing "later disturbance of their relationship to the child by natural parents whose legal rights have not been fully protected.

Id. at 596.

Mrs. Teal did not sign the original adoption petition, nor was she served with process. However, under the facts as found by the trial court, we are of the opinion that she was a party so that Tenn. Code Ann. § 36-1-127(b) is applicable. Mrs. Teal "knew that her son . . . was being adopted by the respondents . . . and . . . consented to the adoption, and aided in the adoption process and authorized her mother, . . . to sign her name to the adoption proceeding . . .."

We also find no merit to Mrs. Teal's contention that she was "not afforded her constitutional right of due process."

Mrs. Teal, by her first issue, contends that the trial court erred in dismissing her Tennessee Rule of Civil Procedure 60.02 motion was filed on October 16, 1984, some twenty-six months later.

Tennessee Rule of Civil Procedure 60.02 provides in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within

> a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court.

To attack a final judgement under the either subsection (1) or (2), the motion must be made "not more than one year after the judgment, order or proceeding was entered or taken." Mrs. Teal's motion, coming some twenty-six months after the final judgment, cannot be considered under subsections (1) or (2). It is clear from the record that subsection (4) does not apply. If Rule 60.02 is to apply, it must be under either subsection (3) or (5). For the reasons heretofore set out, we have found that the judgment is not void. Thus, subsection (3) does not apply.

In *Tyler v. Tyler,* 671 S.W.2d 492 (Tenn. App. 1984), this Court, commenting on subsection (5), stated:

> The exception in T.R.C.P. § 60.02(5) has been construed very narrowly in Tennessee courts. *Gaines v. Gaines,* 599 S.W.2d 561 (Tenn. App. 1980). In *Gaines,* it was noted that Tennessee had recognized only two applications of the rule—one limited to certain workers' compensation cases and the other derived from federal law in cases of "extraordinary circumstances or extreme hardship." *Gaines,* 599 S.W.2d at 564.
>
> In *Magnavox Co. of Tennessee v. Boles & Hite Construction Co.,* 588 S.W.2d 611 (Tenn. App. 1979), this court cited with approval the following passage from 11 Wright & Miller, *Federal Practice and Procedure,* § 2864:

> The broad power granted by [the F.R.C.P. parallel to 60.02(5)] is not for the purpose of relieving a party from free, calculated, and deliberate choices he has made. A party remains under a duty to take legal steps to protect his own interests.

583 S.W.2d at 613.

> The above language was recently cited with approval by the Tennesse Surpeme Court in *Cain v. Macklin,* 663 S.W.2d 794 (Tenn. 1984). Thus, even if we were to agree with that this case somehow fits within the very narrow construction given to T.R.C.P. § 60.02(5), we believe it would still be inappropriate to relieve Mr. Tyler of his "free, calculated, and deliberate choice" in signing the settlement agreement, in effect, consenting to a finding of paternity, and assenting to the payment of child support when he full well knew he was not the natural father.

671 S.W.2d at 495.

We likewise in this case believe it would be inappropriate to set aside a decree of adoption when Mrs. Teal knew that her son was being adopted, consented to the adoption, aided in the adoption process, and authorized her mother to sign her name.

Mrs. Teal further contends that, since Rule 60.02 does not limit the power of a court to entertain an independent action, the trial court erred in failing to consider her motion as an independent action.

Mrs. Teal did not file an independent action. She filed a Tennessee Rule of Civil Procedure 60.02 motion. However, even if this were an independent action, we are of the opinion it would be without merit.

First, under the facts of this case the judgment is not void and, secondly, while Rule 60.02 does not provide an express time limit within which an independent action must be brought, it "must be brought seasonably in light of all the circumstances involved." *Brown v. Raines,* 611 S.W.2d 594, 598 (Tenn. App. 1980). Here, Mrs. Teal became aware of the final decree of adoption no later than "early 1983 and she read it fully." Yet, she waited for more than a year thereafter before taking any action.

Mrs. Teal's first issue is likewise without merit.

The judgment of the Chancellor is affirmed with costs assessed to Mrs. Teal and the cause remanded to the trial court for the collection of costs and any further necessary proceedings.

/s/ Samuel L. Lewis
SAMUEL L. LEWIS, Judge

CONCUR:

/s/ Henry F. Todd
HENRY F. TODD, Presiding Judge, M.S.

WILLIAM C. KOCH, JR., Judge, Concurs in separate opinion

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

Coffee Chancery
App. No. 86-136-II

CALVIN WOODARD BUCKNER, and wife, BOBBIE JO BUCKNER,

Plaintiffs/Appellees,

VS.

THE UNKNOWN FATHER OF RICHARD LEE MASON SANDERS,

Defendant,

SALLY MAE SANDERS TEAL,

Appellant.

FILED
OCT 1 1986

CONCURRING OPINION

This appeal involves the effort of Sally Mae Sanders Teal to set aside her parents' adoption of her son. She filed a Tenn.R.Civ.P. 60.02 motion in 1984 in the Chancery Court for Coffee County alleging that its final adoption decree entered in 1982 was void because she was never made a party to the adoption proceeding and because she had no notice of the adoption until July, 1984. The trial court conducted an evidentiary hearing concerning Mrs. Teal's claims and determined that she "knowingly gave her consent to the adoption and the adoption was and is valid."

The majority of this Court has affirmed the trial judge's decision. While I concur with this result, I cannot concur with the majority's opinion because it is premised upon an erroneous application of Tenn. Code Ann. § 36-1-127(b).

This record clearly shows that the parties' lawyer and the trial court failed to comply with the strict statutory notice and consent procedures in the original adoption proceedings. However, I would decline to set aside the adoption because Mrs. Teal has failed to demonstrate by clear and convincing evidence that she was prejudiced by the procedural defects in the original adoption proceeding.

I.

Sally Mae Sanders Teal is the daughter of Bobbie Joe Buckner. Mrs. Buckner and her husband, Calvin Woodward Buckner, reside in Coffee County. On April 17, 1978, Mrs. Teal, then unmarried, gave birth to Richard Lee Mason Sanders. She was apparently unable to care for her son, and so Mr. and Mrs. Buckner took the boy into their home when he was approximately three years old.

After caring for their grandson for approximately one year, Mr. and Mrs. Buckner filed a petition to adopt him on June 1, 1982 in the Chancery Court for Coffee County. This petition named the boy's "unknown father" as the defendant.

Mrs. Teal was not named as a party to this action. However, the Buckners' sworn petition alleged that

> The natural mother of the child is Sally Mae Sanders, who is joining in this petition and is giving her consent to this adoption, as provided by law.

The petition and the verification included a line for Mrs. Teal's signature apparently for the purpose of evidencing here consent to the adoption. However, Mrs. Teal never signed or verified the petition. Nor did she appear before a judge and execute the consent to adoption form required by Tenn. Code Ann. § 36-1-114.

Mrs. Teal had apparently moved to Texas by the time her parents filed this petition in 1982. She had left her son with his grandparents. Mrs. Teal and the Buckners had several telephone conversations about the adoption. The trial court found that during these telephone conversations, Mrs. Teal consented to her parents' adopting her son and also authorized her mother to sign her name on the petition for adoption. Thus, the signature on the petition and its verification purporting to be Sally Mae Sanders' signature was actually that of her mother.

Mrs. Teal was never served with process after the adoption petition was filed. The boy's "unknown father" was served by publication. The Buckners took a default judgment against the "unknown father" on August 17, 1982. The final decree of adoption was entered on the same day. This decrees stated, in part, that "all necessary parties are properly before the Court" and that Mrs. Teal had joined in the petition and had consented to the adoption.

On October 16, 1984, Mrs. Teal filed a Tenn.R.Civ.P. 60.02 motion in the trial court seeking to set aside the 1982 adoption decree because it was void. She asserted that she had not signed the Buckners' 1982 adoption petition and that

> The judgment is void because Sally Mae Sanders is the natural mother of Richard Lee Mason Sanders and was never made a party of this lawsuit nor did she ever have any notice of the lawsuit.

Mr. and Mrs. Buckner responded to this motion by asserting that Mrs. Teal had actual knowledge of the adoption proceeding and that Mrs. Teal had authorized her mother to sign the adoption petition for her. They also asserted that Mrs. Teal

> is not a fit and proper person to have custody of said child in that she had led a life of crime, immorality and child abuse and neglect for many years and has abandoned the child.

The trial court conducted an evidentiary hearing on November 19, 1984 and entered an order on May 7, 1985 denying Mrs. Teal's motion for post-judgment relief. Its decision is based upon its findings that Mrs. Teal's motion was not timely filed and that Mrs. Teal had consented to the adoption.

II.

The Timeliness of the Tenn.R.Civ.P. 60.02 Motion

The trial court found that Mrs. Teal's motion for post-judgment relief was not timely because it was not filed within one year after the final decree of adoption was entered. This finding is erroneous because the one year filing requirement in Tenn.R.Civ.P. 60.02 applies only to motions seeking relief pursuant to Tenn.R.Civ.P. 60.02(1) and 60.02(2).

Mrs. Teal's motion is not premised upon mistake, inadvertence, surprise, excusable neglect or fraud. On its face, it is premised upon the assertion that the final adoption decree is void. Such a challenge to a judgment falls within the scope of Tenn.R.Civ.P. 60.02(3). The Tennessee Rules of Civil Procedure do not place the same one year time limit upon motions pursuant to Tenn.R.Civ.P. 60.02(3) that they place upon motions pursuant to Tenn.R.Civ.P. 60.02(1) or 60.02(2). See *Wooley v. Gould, Inc.*, 654 S.W.2d 669, 670 (Tenn. 1983).

The timeliness of a Tenn.R.Civ.P. 60.02 motion has little to do with the merits of the claim embodied in the motion. When presented with a Tenn.R.Civ.P. 60.02 motion, the courts must first determine whether the motion is timely. If it is not, the court need proceed no further. If it is

timely, then the court may proceed to the merits of the motion. In both instances, the merits of a Tenn.R.Civ.P. 60 motion should not be confused with its timeliness. A motion can be timely even though it lacks merit. This is the case with Mrs. Teal's motion.

Motions pursuant to Tenn.R.Civ.P. 60.02(3) must be made "within a reasonable time." The trial court made no determination concerning the timeliness of Mrs. Teal's motion. We do not need to make a finding on this matter either because her motion lacks merit even if it had been filed in a timely fashion.

III.

Mrs. Teal's Status as a Party to the Adoption Proceedings

The majority also concludes that Mrs. Teal cannot challenge the final adoption because of the portion of Tenn. Code Ann. § 36-1-127(b) that provides:

> After the final order of adoption is signed, no party to an adoption proceeding, nor anyone claiming under such a party, may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law.

The majority's reliance upon this portion of Tenn. Code Ann. § 36-1-127(b) is misplaced. It applies only to persons who have been made parties to the adoption proceeding. Mrs. Teal was never a party to the 1982 adoption proceeding.

Our courts must be careful to protect the rights of natural parents in adoption proceedings, *Young v. Smith*, 191 Tenn. 25, 33, 231 S.W.2d 365, 369 (1950), because, absent abandonment or consent, their right to the care and custody of their children is superior to all others. *State ex rel. "A" v. A Licensed or Chartered Child-Placing Agency,*

194 Tenn. 400, 406, 250 S.W.2d 776, 778 (1952). One of the rights unquestionably granted to a parent whose child is the subject of an adoption proceeding is the right to notice of the proceedings and an opportunity to appear. Thus, the Tennessee Supreme Court has held:

> It could not be thought that the legislature intended that a child should be taken from the custody of either one of its natural parents, unless it was with their consent or made to plainly appear that it was to the interest of the child that it be done. This could not be legally adjudged unless the parents should have notice of the proceeding or voluntarily appear. The notice need not necessarily be a formal one, but some notice and some appearance must be shown. The plainest instincts of natural justice require that the natural parents should know of the proceeding before the custody of their child is taken from them and given to another.
>
> *In re Knott*, 138 Tenn. 349, 354, 197 S.W. 1097, 1098 (1917).

Tennessee's adoption statutes, which must be construed strictly,[2] provide two procedures to bring a child's natural parents before the Court. See *In re Matthews*, 203 Tenn. 161, 169, 310 S.W.2d 185, 189 (1958). The first procedure, used in situations where either of the natural parents oppose the adoption, is to name the natural parents as parties and to serve them with process as in other civil cases. The second procedure, specifically applicable to cases such as this one where a child has been born out of wedlock, enables the persons seeking to adopt the child to bring

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[2] *In re Clements' Petition*, 201 Tenn. 98, 105, 296 S.W.2d 875, 878 (1956); *Young v. Smith*, 191 Tenn. 25, 32, 231 S.W.2d 365, 368 (1950); and *In re Adoption of Taylor*, 678 S.W. 2d 69, 71 (Tenn.Ct.App. 1984)

the natural parent before the court by filing the natural parent's properly executed consent to the adoption along with the adoption petition pursuant to Tenn. Code Ann. § 36-1-113(a). When a proper consent is filed, Tenn. Code Ann. § 36-1-112(a) provides that the consenting parent will be deemed to be a party to the adoption proceeding.

Mrs. Teal is not a party under either procedure. She was not named as a party and served with process, and here purported consent to the adoption of her child did not meet the requirements of Tenn. Code Ann. § 36-1-114.

Tennessee's adoption statutes provide for only one means to obtain a valid parental consent. Pursuant to Tenn. Code Ann. §§ 36-1-102(3)[3] and 36-1-114(a), these consents must be made before a judge of the circuit or chancery court in chambers. Tenn. Code Ann. § 36-1-114(d) prescribes the form that must be used. These provisions are mandatory because the ultimate validity of the adoption may rest upon this step. *McIntyre v. Doe,* 206 Tenn. 131, 139, 332 S.W.2d 191, 195 (1960) and *Young v. Smith,* 191 Tenn. 25, 33, 231 S.W.2d 365, 369 (1950).

The record makes it clear that Mrs. Teal did not appear in chambers to consent to her child's adoption in 1982. It is likewise clear that she never executed a surrender or consent document in the form required by statute. Therefore, she cannot be considered to be a party pursuant to Tenn. Code Ann. § 36-1-112(a).

IV.

Mrs. Teal's Entitlement to Post-judgment Relief

The importance of obtaining a proper parental consent in an adoption proceeding cannot be overemphasized. However, the failure to follow Tenn. Code Ann. § 36-1-114

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[3] This statute equates parental "consent" with parental "surrender" and with "written consent."

does not necessarily require that an adoption decree be vacated in every case. Once an adoption has been granted, the Legislature and the courts have recognized that it is in the child's best interests to leave the adoption undisturbed except in the most extreme circumstances.

The Legislature's preference for finality is expressed in Tenn. Code Ann. §§36-1-101(a) and 36-1-127(b). Thus, a party to an adoption proceeding is forever foreclosed from collaterally attacking an adoption decree once it is final. *Brown v. Raines,* 611 S.W.2d 594, 596 (Tenn.Ct.App. 1980). While natural parents or guardians who were not parties to the adoption proceeding are not similarly foreclosed, Tenn. Code Ann. § 36-1-127(b) provides that

> [n]o adoption may be questioned by reason of any procedural or other defect by any one not injured by such defect.

Therefore, a non-party seeking to use Tenn.R.Civ.P. 60.02 to set aside an adoption decree must demonstrate by clear and convincing evidence that he or she was injured by the defect in the adoption proceeding. See *In re Bishop,* 678 S.W.2d 471, 472 (Tenn.Ct.App. 1984). I would find that Mrs. Teal has not carried this burden in this case.

The primary purpose of Tenn. Code Ann. § 36-1-114 consent procedures is to provide a reliable means by which a natural parent is notified that his or her child is subject of an adoption proceeding. While the execution of a Tenn. Code Ann. § 36-1-114(d) consent form provides highly reliable evidence that notice had been given, adequate notice can still be proved in the absence of a properly executed form. The Tennessee Supreme Court has held that formal notice to the natural parent is not necessarily required. *In re Knott,* 138 Tenn. 349, 354, 197 S.W. 1097, 1098 (1917).

The trial court concluded, and Mrs. Teal does not now dispute, that she had actual notice of here parents' inten-

tion to adopt her son and that she orally consented to the adoption before here parents filed the adoption petition. Thus, even though there is proof that the statutory notice and consent procedures were not followed, Mrs. Teal has not demonstrated by clear and convincing evidence that she was prejudiced by these procedural omissions. Without a demonstration of prejudice, Mrs. Teal is not entitled to relief.

/s/ William C. Koch, Jr.
WILLIAM C. KOCH, JR., Judge

IN THE CHANCERY COURT OF COFFEE COUNTY, TENNESSEE

No. 82-125

CALVIN WOODARD BUCKNER, and wife, BOBBIE JO BUCKNER,

Petitoners,

VS.

THE UNKNOWN FATHER OF RICHARD LEE MASON SANDERS,

Defendant.

FILED

MAY 7 1985

FINAL DECREE

This cause came on to be heard on November 19, 1984 before the Honorable L.F. Steward, Chancellor, holding Chancery Court of Coffee County, Tennessee upon the *Motion and Petition* of Sally Mae Sanders, (petitioner), natural mother of Richard Lee Mason Sanders, for the Court to correct the Order and set aside the Final Decree of Adoption entered on April 17, 1982; upon the Objection the the Motion to correct the Final Decree of Adoption and the Answer to the Petition to set aside the Adoption Order, filed by Calvin Woodard Buckner and wife, Bobbie Jo Buckner, upon the testimony of the parties and witnesses adduced in open court, argument of counsel, and the entire record in this cause.

From all of which the Court makes the following findings of fact:

1. The Motion was not timely filed under Rule 60.02, Tennessee Rules of Civil Procedure, in that it was not filed within one (1) years after the judgment was entered.

2. The letter from petitioner, Sally Mae Sanders, to respondent, Bobbie Jo Buckner, dated May 11, 1982 and entered as Exhibit 1 in this cause was not persuasive to the Court and the Court finds that the parties had talked about the adoption several times and that petitioner knew that her son, Richard Lee Mason Sanders, was being adopted by the respondents, Calvin Woodard Buckner and wife, Bobbie Jo Buckner, and that she consented to the adoption and aided in the adoption process and authorized her mother, Bobbie Jo Buckner, to sign her name to the adoption petition and therefore, Sally Mae Sanders was properly made a party to the adoption petition and process.

3. Petitioner had had a problem caring for the child and that problem reached a point where adoption by the respondents was a reasonable alternative; that although petitioner was in somewhat of a condition of desperation she consented to the adoption.

4. That petitioner was shown the Adoption Decree by Calvin Buckner and Bobbie Jo Buckner in early 1983 and she read it fully and voiced not objection to the wording of the final decree except when was upset because "Mason" was left out of the child's name change.

The Court is of the opinion and so finds and concludes that the petitioner, Sally Mae Sanders, knowingly gave her consent to the adoption and the adoption was and is valid and therefore the Motion to correct the adoption Order and the Petition to Set Aside the Adoption Order are denied.

The Court having denied the Motion to correct the adoption Order and the Petition to Set Aside the Adoption Order and having held that the adoption is valid, it is necessary for the Court to make findings and conclusions

as to whether or not the petitioner, Sally Mae Sanders, has abandoned the child and whether or not she is a fit and proper person to have custody of said child and it is unnecessary for the adoption Order to be amended and therefore, these motions and prayers for relief of the respondents are denied. The Court does find that the child is being well cared for by the respondents, Calvin Woodard Buckner and wife, Bobbie Jo Buckner, and this is not disputed by the petitioner, Sally Mae Sanders.

The cost of the cause shall be paid by petitioner, Sally Mae Sanders, for which execution may issue if necessary.

IT IS SO ORDERED.

Entered this 3rd day of May, 1985.

/s/ L.F. Stewart
CHANCELLOR

Approved for Entry:

T. Arthur Jenkins, *Attorney for Petitioner,* Sally Mae Sanders

FORRESTER & RICHARDSON

By: Doyle E. Richardson, *Attorney for Respondents,* Calvin Woodward Buckner and Bobbie Jo Buckner